

****NOT FOR PRINTED PUBLICATION****

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NICHOLAS C. DANIELS and
ROWENA DANIELS

Plaintiffs,

V.

JPMORGAN CHASE BANK and
FEDERAL HOME LOAN
MORTGAGE CORPORATION

Defendants.

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CASE NO. 4:13-CV-105
Judge Clark/Judge Mazzant

**ORDER ADOPTING REPORT AND
RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE**

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636. On May 15, 2013, the report of the Magistrate Judge was entered containing proposed findings of fact and recommendations that defendants' Motion to Dismiss [Doc. #8] be granted [Doc. #9]. On June 21, 2013, plaintiffs filed a Response to Report and Recommendation of United States Magistrate Judge, Written Objections to Proposed Findings and Recommendation and Request for Stay of Proceedings [Doc. #12]. On June 28, 2013, defendants file a response [Doc. #14].

Plaintiffs commenced this lawsuit in state court against defendants. On February 26, 2013, defendants removed this case to this court. In state court, plaintiffs filed their lawsuit as an "Original Petition for Declaratory Judgment and Application for Temporary Restraining Order and Temporary Injunction." Plaintiffs seek a declaration that their home was wrongly foreclosed in 2009 due to the

alleged failure to complete a loan modification and that plaintiffs are entitled to relief pursuant to the “settlement reached between JP Morgan Chase Bank and the OCC” in 2013. On February 28, 2013, the court entered its Order and Advisory, giving plaintiffs an opportunity to file an amended complaint, but plaintiffs did not file an amended pleading. On April 22, 2013, defendants filed a Motion to Dismiss (Dkt. #8). Plaintiffs did not file a response to the motion.

On May 15, 2013, the U.S. Magistrate Judge entered a report and recommendation finding that the motion to dismiss should be granted because plaintiffs failed to file a response and plaintiffs had pleaded no plausible claims against defendants. Any objections plaintiffs may have had would normally have been due on June 1, 2013.¹ In this case, due to an insufficient address for the *pro se* plaintiffs, the report had to be sent a second time by the clerk of the court and it was sent on June 4, 2013. The record does not demonstrate the date the report was received, due to an incomplete green card. If the court assumes that the report was received three days after mailing, the objections were due on June 21, 2013. Thus, plaintiffs timely filed objections.

Plaintiffs’ only objection is that defendants did not serve a copy of the motion to dismiss upon them. Plaintiffs request a stay of all proceedings in this court until such time as it can be ascertained that the defendants properly served the plaintiffs with notice of the filing of their motion to dismiss.

Defendants respond with evidence that they sent a copy of the motion to dismiss via certified mail and regular first-class mail to the address listed in plaintiffs’ pleadings. Due to an error in its

¹ The report and recommendation notified plaintiffs that objections were due within fourteen days after service of the report. Defendants assert that the objections were due May 29, 2013. Although May 29, 2013, is fourteen days after issuance of the report and recommendation, the rules require three days to be added, making the due date June 1, 2013. However, in this case, the fourteen days run from receipt of the report.

computer system, the U.S. Postal Service is unable to provide confirmation that the certified mail was delivered to the intended address, but it was never returned to sender. The first-class mail copy was also never returned to sender. Defendants provide sufficient proof that service was provided in compliance with the rules.

Plaintiffs' objections only relate to the lack of notice and fail to address the merits of the case. There was no objection to the Magistrate Judge's determination that no plausible claims were asserted in this case. Plaintiffs also chose to forgo their opportunity to amend their complaint. The court agrees that there are no plausible claims.

Having received the report of the United States Magistrate Judge, and considering the objections thereto filed by plaintiffs, this court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge's report as the findings and conclusions of the court.

It is therefore **ORDERED** that defendants' Motion to Dismiss [Doc. #8] is GRANTED and plaintiffs' case is **DISMISSED** with prejudice.

All relief not previously granted is hereby **DENIED**.

The Clerk is directed to **CLOSE** this civil action.

So **ORDERED** and **SIGNED** this **16** day of **July, 2013**.



Ron Clark, United States District Judge